IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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NO. 80-5778

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JOSEPH WILSON, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether Petitioner's contentions 1 through 4, which are raised for the first time here on this petition for certiorari, are properly before this Court for consideration in reaching its decision on whether the requested writ of certiorari should be granted.

2.

Whether the Supreme Court of Georgia properly concluded, after an appellate review of the district attorney's file, that no exculpatory evidence material either to Petitioner's guilt or punishment was improperly denied Petitioner at trial.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
REASONS FOR NOT GRANTING THE WRIT	
A. AS PETITIONER'S CONTENTIONS NOS. 1 THROUGH 4 ARE RAISED FOR THE FIRST TIME HERE ON THIS PETITION FOR CERTIORARI, THEY ARE NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE CONSIDERED BY THE COURT IN REACHING ITS DECISION ON WHETHER THE REQUESTED WRIT OF CERTIORARI SHOULD BE GRANTED	10
B. THE SUPREME COURT OF GEROGIA PROPERLY CONCLUDED, AFTER AN APPELLATE REVIEW OF THE DISTRICT ATTORNEY'S FILE, THAT NO EXCULPATORY EVIDENCE MATERIAL EITHER TO PETITIONER'S GUILT OR PUNISHMENT WAS IMPROPERLY DENIED PETITIONER AT TRIAL. . .	11
CONCLUSION.	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases cited:	Page
Brady v. Maryland, 373 U.S. 83 (1963)	12, 13, 14
Cardinale v. Louisiana, 394 U.S. 437, 438-439 (1969)	10
Estate of Wilson v. Akin Industries, Inc., 439 U.S. 877 (1978)	10, 11
Hicks v. State, 232 Ga. 393, 207 S.E.2d 30 (1974)	11
Lundy v. State, 139 Ga. App. 536, 228 S.E.2d 717 (1976)	12, 13
Moore v. Illinois, 408 U.S. 786, 799 (1972)	10, 12
Nations v. State, 234 Ga. 709, 217 S.E.2d 287 (1975)	11
United States v. Agurs, 427 U.S. 97 (1976)	13
Wilson v. State, 246 Ga. 62, ___S.E.___(1980)	1
Wisdom v. State, 234 Ga. 650, 217 S.E.2d 244 (1975)	14

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PART ONE

STATEMENT OF THE CASE

(i)

Petitioner seeks to have this Court review the decision of the Supreme Court of Georgia in Wilson v. State, 246 Ga. 62, ___S.E.___ (1980), rendered on June 10, 1980, affirming Petitioner's convictions for murder, kidnapping with bodily injury, and possession of a firearm during the commission of a crime.[1/]

1/ A copy of the decision of the Supreme Court of Georgia, the brief filed by Petitioner on direct appeal, and Petitioner's motion for rehearing are attached hereto as Respondent's Appendices A through C respectively.

Sentences of death, life imprisonment, and five consecutive years imprisonment were respectively imposed. Petitioner's motion for rehearing was denied on June 24, 1980.

On or about August 21, 1980, Petitioner applied to this Court for an extension of time within which to file his petition for a writ of certiorari. On September 10, 1980, as revealed by an examination of Petitioner's Appendix B, this Court granted Petitioner an extension of time within which to file his petition to, and including November 21, 1980. On or about November 21, 1980, as revealed by an examination of Petitioner's certificate or service, Petitioner filed this instant petition for a writ of certiorari.

(ii)

STATEMENT OF THE FACTS

On Friday, February 23, 1979, the Petitioner, Joseph Wilson, kidnapped George A. Knox, taking him from a house at gunpoint to a field in south Forsyth County. The Petitioner then executed Knox by shooting him between the eyes.

Knox lived temporarily with his girlfriend, Patty Johnson, at 2596 Austell Road in Cobb County. (T. 602, 606). Ms. Johnson met the Petitioner, Wilson, through the victim George A. Knox. (T. 609). Petitioner visited Knox at Ms. Johnson's house approximately four times, each time Petitioner carried a double-barrel sawed-off shotgun. (T. 610, 614, 616). On February 16, 1979, Petitioner interjected himself into a telephone conversation between Ms. Johnson and Knox by placing an emergency phone call to Knox. (T. 617). Knox told Ms. Johnson that Petitioner had wanted her to help him

sell a quantity of marijuana. (T. 617). Petitioner later called Ms. Johnson to get her response, and to make arrangements to deliver the marijuana to Ms. Johnson on February 23. (T. 618, 619).

Pursuant to an agreement between Petitioner and Knox made the week prior to the murder, Knox planned to leave a set of keys for Petitioner on the bumper of a car parked near Ms. Johnson's house. (T. 621, 622). For that service, Knox was to receive a rather large sum of money from Petitioner. (T. 621). On the night Petitioner planned to pick up the keys, Knox arranged to have a third party make a duplicate set of the keys before Petitioner arrived. (T. 623). Neither the original keys nor the duplicates were returned to Knox that night. (T. 625). Knox became scared and left the house because he knew Petitioner would be looking for him, and for the keys. Petitioner telephoned Ms. Johnson, but did not come by her house. (T. 624, 625). Ms. Johnson testified that the incident created animosity between Petitioner and Knox. (T. 621). The day after the incident, Knox told Ms. Johnson that he and Petitioner were back on congenial terms. (T. 625-627).

On Friday, February 23, 1979, Knox stopped by Ms. Johnson's house at noon, and again during the evening. (T. 630). Three witnesses were present when Petitioner abducted Knox from Ms. Johnson's house. Kenneth and David Burns went to Ms. Johnson's house at approximately 9:00 p.m. to visit with Knox. (T. 633, 634, 762, 804). Knox was not there, so the Burnses decided to wait. (T. 805). Ms. Johnson told the men that they would have to leave when Petitioner arrived. (T. 765, 805). At approximately 9:10 p.m. Knox called and asked if someone would pick him up at a

nearby service station. (T. 635, 763, 806, 821). Shortly, after Ken Burns left to pick up Knox, Knox arrived at the house via another ride at approximately 9:25 p.m. (T. 636, 764, 772, 806, 807, 822). Burns later returned and everyone continued drinking beer. (T. 637, 764, 765, 808). Knox and the Burnses sat on the sofa while Ms. Johnson sat nearby. (T. 637, 766). Witnesses testified that Knox always carried a chain covered with tape, possibly for use as a weapon. (T. 629, 766).

At approximately 9:30 p.m. Petitioner telephoned Ms. Johnson asking if Knox was there. (T. 639). Petitioner told Ms. Johnson not to tell Knox that he was on his way to the house. (T. 640). Petitioner arrived approximately fifteen minutes later, carrying the murder weapon, a 12 guage shotgun. (T. 637, 639, 641, 766, 780, 809, 825). Petitioner pointed the shotgun in Knox's face insisting that Knox had "set him up" and "put the heat on." (T. 641, 768, 781, 809, 810, 828). Knox denied the accusations. (T. 641, 768, 828). The Burnses became scared and started to leave. (T. 641, 768, 769, 828).

Still pointing the shotgun, Petitioner told Knox, "let's go." (T. 642). When Knox reached for his coat and chain Petitioner told him that he would not need them. (T. 642). Witnesses saw Petitioner walk out the door behind Knox, holding the shotgun pointed at Knox's back. (T. 642, 769, 787, 811, 830).

Shortly after Petitioner and Knox left Ms. Johnson's house, Petitioner's wife, Jody, telephoned and asked if Knox had left with Petitioner. (T. 646). Approximately an hour later Ms. Johnson telephoned Petitioner's house and Petitioner answered. (T. 646, 705). Petitioner stated that Knox was

at his house and that he was all right. In an effort to keep secret the identity of the caller from the others in the room with him Petitioner told Ms. Johnson, "Tell Betty and the kids hi for me." (T. 647).

Later that night, at approximately 2:00 a.m. on February 24, Petitioner, telephoned Ms. Johnson and stated "George has been taken care of." (T. 648, 649). Petitioner instructed Ms. Johnson to dispose of Knox's coat. (T. 649). Petitioner told Ms. Johnson to call him only from a pay phone and if asked, tell the police she last saw Knox at Friday noon. (T. 650, 653). Ms. Johnson threw Knox's jacket in the burned out frame of the house next door. (T. 651).

Mrs. Frances Lane lived just off Rogers Road, a rural area in Cummings, Georgia. (T. 572). Shortly before 1:00 a.m. on February 24, Mrs. Lane heard a gunshot ring from the pasture near her home. (T. 573-575). Later that morning, Mrs. Lane spotted a body lying in the pasture approximately 300 yards from her house and summoned a neighbor, Albert Mayes. (T. 576-578, 584). Mr. Mayes telephoned the police after observing that the face of the body had been blown off. (T. 587, 588).

Jimmy C. Adams of the Forsyth County Sheriff's Department, arrived at the scene of the murder and found a body with an open forehead wound. (T. 418, 419, 423). A tatoo initialed "GK", a driver's license, and miscellaneous papers all served to identify the victim as George A. Knox. (T. 426-428). Cash register receipts dated February 23, indicated that the victim had been alive the previous day. (T. 429). Sixteen dollars in cash was found in the victim's wallet. (T. 553).

Aside from matter from the wound, no other physical evidence was found in the area. (T. 422). The heavy rainfall during the night destroyed evidence of tire tracks. (T. 547).

Dr. Larry Howard testified that the cause of death was a three and one-half inch gunshot wound to the face centered between the eyes. (T. 726, 736). The facial area was heavily damaged, resulting in almost total destruction of the brain. (T. 727, 728). No other injuries or bruises were noted on the body. (T. 727). Dr. Howard recovered a large amount of shot and wadding along with a plastic shot cup from inside the head. (T. 728). Dr. Howard testified that the items recovered were consistent with the remains of a shell fired from a 12 guage shotgun. (T. 728). The wound indicated that the distance of fire was approximately five feet. (T. 729). State Crime Lab officials conducted alcohol and drug tests on the victim, the results of which were negative. (T. 795, 798).

Joseph Evankouech sold Petitioner the 12 guage shotgun in December, 1978. (T. 839, 840, 847). At that time, the barrel was not sawed off. (T. 847). David Schaffer testified that he saw Petitioner with the shotgun on two occasions. (T. 847). On the second occasion, the shotgun barrel had been sawed off. (T. 848).

Glennis Abee and Alma Ruth Johnson testified that Petitioner came to their apartment at approximately 8:00 p.m. on February 23, 1979. (T. 524, 1073, 1074, 1092, 1098). Petitioner showed Abee and Johnson a roll of shotgun shells. (T. 1074, 1075, 1093). Petitioner asked Abee if she had seen Knox and stated that he (Petitioner) was going to

"blow his mother-fucking brains out." (T. 523, 524, 1076). Petitioner made a similar threatening statement regarding Knox to Alma Johnson. (T. 524, 1093).

Investigators first spoke with Patty Johnson on Saturday, February 24, 1979, and informed her Knox had been murdered. (T. 434, 653, 654). Ms. Johnson stated then that she last saw Knox at noon on Friday. (T. 557, 655). Ms. Johnson later gave a statement to police relating information about the kidnapping and murder. (T. 442, 443, 656). The Burnses both gave statements to police in regards to witnessing the kidnapping. (T. 444, 445). Various statements made by Petitioner's relatives, friends, and witnesses led police to Petitioner. Petitioner was arrested on February 27, 1979, at his home in Shadowpark Trailer Park in Norcross. (T. 446, 464, 885). Petitioner was interviewed at 8:30 a.m. that morning. (T. 448, 456). Following a Jackson v. Denno hearing, the court ruled Petitioner's statement to be knowingly and voluntarily made, and admissible. (T. 449-499).

In his defense, Jody Wilson, Petitioner's wife, testified that Petitioner left their house on February 23, 1979, at approximately 7:00 p.m. and returned home alone at 10:00 p.m. (T. 887-900). Jody testified that Petitioner made one telephone call to a friend, Terry Morgan, at 10:15 p.m., but did not leave the house again that night. (T. 888, 891, 899, 900). Morgan lived with Petitioner's father. (T. 899). Jody testified that Petitioner bought the shotgun for her use in a gunsmithering class and that he (Petitioner) sawed off the barrel for easy handling. (T. 901, 902). Jody testified that Ms. Johnson repeatedly telephoned her home stating that she needed to talk with her. (T. 906).

In rebuttal, Ms. Johnson testified that Jody actually telephoned her requesting that they meet. (T. 930). Ms. Johnson contacted Officer Adams concerning the meeting and an electronic surveillance was set up at Ms. Johnson's house. (T. 911, 912, 920, 922, 930, 931). A meeting between Ms. Johnson and Jody was had on March 4, 1979. (T. 912, 916). During their conversation, Jody expressed her apprehension that the house was bugged. (T. 952, 954). Jody stated to Ms. Johnson that Petitioner made a phone call to his father shortly after 11:00 p.m. on February 23, and that Knox was murdered between 12:00 p.m. and 2:00 a.m. (T. 956). Ms. Johnson asked Jody "What did you all do with that gun?" (T. 964). Jody replied, it would not be found, "there's pieces here and there's pieces there, and there's pieces everywhere." (T. 964).

Petitioner's father, Joseph Wilson, Sr., lives in Chattanooga, Tennessee. Mr. Wilson testified that Petitioner brought the shotgun to Chattanooga in late January. (T. 871). Mr. Wilson stated that he brought the shotgun to Atlanta on February 11, 1979, but took it back with him to Chattanooga on the same day. (T. 871, 872). Mr. Wilson further testified that he disposed of the shotgun on the following day. (T. 873).

Jody testified that Mr. Wilson told her that he had gotten rid of the shotgun although Mr. Wilson testified that he had not told anyone that he had destroyed the shotgun. (T. 880, 881). Mr. Wilson denied that Jody brought the gun to him to be destroyed following Petitioner's arrest. (T. 881-882). Abee testified that Petitioner brought a sawed-off shotgun to her house on February 14, 1979. (T. 1085, 1086).

On the witness stand, Petitioner reiterated his statement made to police following his arrest. Petitioner denied kidnapping or killing Knox. (T. 1036). Petitioner denied going to Ms. Johnson's house on February 23, 1979, or calling Ms. Johnson and instructing her to dispose of Knox's belongings. (T. 1030, 1037). Petitioner denied that he saw Knox on February 23, 1979. (T. 982). Petitioner testified that he stated to Alma Johnson that he should kick George's ass, but denied making any other threatening statements. (T. 991, 992, 1009). Petitioner denied showing Alma a shotgun shell, stating that what he showed her was actaully a roll of pennies. (T. 1005, 1006, 1008). Petitioner testified that he arrived home at approximately 10:15 p.m. on February 23 and remained there until the following day. (T. 993, 996). Petitioner also denied ever having "dope" deals with Ms. Johnson or Knox. (T. 1031, 1032). Additional facts will be developed as needed for a more thorough illumination of any issues presented here on this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. AS PETITIONER'S CONTENTIONS NOS. 1 THROUGH 4 ARE RAISED FOR THE FIRST TIME HERE ON THIS PETITION FOR CERTIORARI, THEY ARE NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE CONSIDERED BY THE COURT IN REACHING ITS DECISION ON WHETHER THE REQUESTED WRIT OF CERTIORARI SHOULD BE GRANTED.
(Contentions Nos. 1 through 4).

In this instant case an examination of Respondent's Appendices A, [decision of Supreme Court of Georgia on direct appeal], B [briefs of Petitioner on direct appeal], and C [petition for rehearing], readily reveals that Petitioner's contentions nos. 1 through 4 constitute alleged federal constitutional issues raised for the first time by the Petitioner here on this petition for a writ of certiorari. In this regard, in Estate of Wilson v. Akin Industries, Inc., 439 U.S. 877 (1978), this Court stated that:

> "It is well settled that certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a state-court decision. Moore v. Illinois, 408 U.S. 786, 799 (1972); Cardinale v. Louisiana, 394 U.S. 437, 438-439 (1969). There appears to be an exception to that rule, however, whenever the federal issue arose from an unanticipated ruling by the state court, the petition for rehearing presented the first

opportunity to raise it, and that opportunity was seized. (Cites omitted)." Estate of Wilson, supra, at 879.

In Accordance with Estate of Wilson, supra, an examination of Respondent's Appendices A through C reveals that Petitioner's attempt to litigate his contentions nos. 1 through 4 for the first time here on this instant petition does not fall within the exception enunciated in Estate of Wilson, supra.

Accordingly, for the foregoing reasons, Petitioner's contentions nos. 1 through 4 present nothing for consideration by this Court.

B. THE SUPREME COURT OF GEORGIA PROPERLY CONCLUDED, AFTER AN APPELLATE REVIEW OF THE DISTRICT ATTORNEY'S FILE, THAT NO EXCULPATORY EVIDENCE MATERIAL EITHER TO PETITIONER'S GUILT OR PUNISHMENT WAS IMPROPERLY DENIED PETITIONER AT TRIAL. (Contention No. 5).

In Nations v. State, 234 Ga. 709, 217 S.E.2d 287 (1975), the Supreme Court of Georgia stated that:

"There is no Georgia statute nor rule of practice which requires the district attorney to open his files to the accused, nor is the accused entitled as a matter of right to receive copies of police reports and investigation reports made in the course of preparing the case against the client." 2/ Hicks v. State, 232 Ga. 393, 207 S.E.2d 30 (1974).

2/ This instant case was tried before enactment of the 1980 Act providing for discovery of the defendant's confession or statements made in police custody, and for discovery of scientific reports to be used by the state, e.g., crime lab reports, autopsy reports, blood alcohol tests, etc. Ga. Laws 1980, p. __ (H.B. No. 672, Act No. 1333).

However, discovery in the Georgia courts must constantly be considered in light of Brady v. Maryland, 373 U.S. 83 (1963). The rule upon which the decisions are based reads as follows:

> "Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis added). Brady, supra at 87; Lundy v. State, 139 Ga. App. 536, 228 S.E.2d 717 (1976).

Implicit in the rule as stated in Brady, supra, is the requirement that the suppressed evidence be material either to guilt or to punishment. Moore v. Illinois, 408 U.S. 786 (1972).

In this instant case the appellate court conducted an examination of the district attorney's files in conjunction with Petitioner's contention on direct appeal that he had been denied favorable evidence by the prosecution. An examination of the opinion rendered by the Supreme Court of Georgia reveals that, with the possibility of one exception, it found no exculpatory material not provided the Petitioner. The one aforementioned exception concerns a Georgia Crime Information Center report which reflected that David Burns, who testified against Petitioner at trial, was convicted on four counts of dangerous drugs and bad check and was given three months probation and required to pay $36.00 in restitution. At this point the Respondent notes that the Georgia Crime Information Center report was not examined by the trial judge prior to trial.

While Petitioner contends that the Georgia Crime Information Center report on David Burns should have been provided him under his Brady motion, Respondent notes that Petitioner has completely failed to demonstrate how the foregoing information was material either to his guilt or to punishment.

Assuming arguendo that there is present the element of suppression, on this petition for a writ of certiorari there still rests upon the Petitioner the burden of meeting the materiality requirements of Brady, supra. The Court of Appeals of Georgia in Lundy v. State, supra, at 539, citing United States v. Agurs, 427 U.S. 97 (1976), stated that:

> ". . . implicit in the requirement of materiality is a concern that the suppressed evidence might have effected the outcome of the trial . . .. The mere possibility that an item of undisclosed information might have helped the defense, or might have effected the outcome of the trial, does not establish 'materiality' in the constitutional sense. . .. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means the omission must be evaluated in the context of the entire record. . .. If there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial."

In this instant case the testimony of witness David Burns was corroborated by that of Kenneth Burns and Patty Johnson, as well as the subsequent corroboration of the testimony of Patty Johnson by the Petitioner himself. As is apparent upon an examination of the trial transcript, which examination will reflect the overwhelming evidence of Petitioner's guilt, the allegedly suppressed evidence concerning the Georgia Crime Information Center report on witness David Burns was immaterial to either Petitioner's guilt or punishment. In Wisdom v. State, 234 Ga. 650, 217 S.E.2d 244 (1975), the Supreme Court of Georgia correctly stated that:

> "[A]ppellant would still have the burden of showing that the denial of these statements to him so impaired his defense that he was denied a fair trial within the meaning of the Brady rule."

On this instant petition for a writ of certiorari, as on his direct appeal to the Georgia Supreme Court, Petitioner has completely failed to meet the materiality requirement under Brady, supra. Accordingly, this contention is clearly without merit.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by the court is presented, and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: JUN 10 1980

35987. JOSEPH WILSON, JR. v. STATE.

HILL, Justice.

This is a death case. From the presentation of the evidence the jury was authorized to find the following: The defendant, Joseph Wilson, Jr., and the victim, George A. Knox, and the victim's girl friend, Patty Johnson, were involved one to another or all together in some sort of drug deal.

On the evening of February 23, 1979, the defendant told two witnesses that he was going to blow the victim away. At about 9:45 p.m. that night the defendant abducted the victim at gunpoint from Patty Johnson's house in Cobb County. The victim was in the house with Ms. Johnson and two of his friends when the defendant entered the house carrying a 12-gauge, sawed-off shotgun. He pointed the gun at the victim and said something to the effect that "You set me up", or "You put the heat on me." The victim denied the allegation. The two friends, David and Kenneth Burns, attempted to leave but the defendant pointed the shotgun at them. After being assured that these two knew nothing, the defendant permitted them to go. The defendant again pointed the shotgun at the victim and said, "Let's go." The victim attempted to take his jacket and a chain that he carried, allegedly for protection, but was told he wouldn't need them. The defendant and the victim left the house in the defendant's truck. The Burns brothers saw them come out of the house. Later that night the defendant talked with Ms. Johnson over the telephone and told her that the victim had been "taken care of." The defendant told her to get rid of the victim's jacket.

The victim's body was found the next morning in a field in Forsyth County. He had been shot by a 12-gauge shotgun blast between the eyes at close range. The evidence at the scene indicated that the body was found where the shooting occurred. A neighbor testified that she heard a shot at about 1 a.m. There were no other wounds on the body. The defendant was subsequently arrested, indicted, tried, and based primarily upon the testimony of Patty Johnson, David and Kenneth Burns and the investigating officers, was convicted of the murder of George A. Knox, the kidnapping with bodily injury of George A. Knox, and possession of a firearm during the commission of a crime. He was sentenced to death for the murder based on the statutory aggravating circumstance found by the jury, kidnapping with bodily injury to the victim. He was also sentenced to life imprisonment for kidnapping with bodily injury and to five years for possession of the firearm.[1/] The evidence was sufficient to convince a rational trier of fact of defendant's guilt beyond a reasonable doubt. Jackson v. Virginia, ____U.S.____ (99 SC 2781, ____LE2d ____ (1979).

Prior to trial, the defendant filed a 12 paragraph "Motion for Discovery" stating that it was made under authority of Brady v. Maryland, 373 U.S. 83 (83 SC 1194, 10 LE2d 215) (1963), and other cited cases, and under authority of Code Ann. §§ 38-801, 38-802. This motion called for some items particularly (e.g., statement of Patty Johnson) and described some items generally (e.g., memoranda or reports of law enforcement officers from Forsyth, Cobb and Gwinnett Counties regarding the defendant

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/1/ At the guilt-innocence trial the defendant sought to establish that he was at home with his wife on the night of the murder. At the sentencing trial he admitted that Ms. Johnson had testified truthfully as to his taking the victim from her house and testified that the victim was abducted from him by two men after he and the victim left the Johnson home.

and the case). The motion called for the production of these items at all pretrial hearings and at trial and asked that defense counsel be permitted to examine the documents or, if examination be denied, that the court conduct an in camera inspection of such documents and that counsel be permitted to examine exculpatory materials found by the court in the in camera inspection.[2/]

On June 13, 1978, the defendant filed a notice to produce calling for production pursuant to Code Ann. §§ 38-801, 38-802 of eight categories of specifically described items (some of which were listed in the earlier "Motion for Discovery") at a pretrial hearing set for the following day. Following that hearing, the court entered an order requiring the state to submit much of the requested material to the defendant for examination and requiring the district attorney and Forsyth County sheriff to submit their files to the court for an in camera inspection looking for exculpatory materials. The trial judge conducted the in camera inspection and initialed in red ink the materials he reviewed.

After the defendant examined the statements of Patty Johnson and David and Kenneth Burns, the defendant filed another notice to produce seeking to require the state to produce copies of those statements at any pretrial hearing and at trial.

1. The defendant has enumerated three alleged errors on the guilt-innocence phase of the trial. Two of these enumerations, with subparts, deal with the production of documents. In substance defendant complains that the trial court erred (1) in failing to provide the defendant with exculpatory material found during the in camera inspection, (2) in failing to find that the statements of Patty Johnson and David and Kenneth Burns were

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/2/ For the reasons which appear below, we do not approve of the practice of combining in one motion items sought by notice to produce with items sought pursuant to Brady v. Maryland, supra.

exculpatory, (3) in failing to furnish copies of the statements of Patty Johnson and David and Kenneth Burns to defendant's counsel, and (4) in failing to make a record or inventory of the materials the court examined in camera or to require that they be deposited in the registry of the court, thereby depriving the defendant of the right of appellate review of the in camera inspection.[3/]

In Brown v. State, 238 Ga. 98, 101 (231 SE2d 65) (1976), this court held that, pursuant to Code Ann. § 38-802, the notice to produce provisions of Code Ann. § 38-801(g) are applicable in criminal cases. As was pointed out in Brown, 238 Ga. at 100, sections 38-801 and 38-802 of our Code are unrelated to disclosure of exculpatory materials pursuant to Brady v. Maryland, supra.

Notices to produce under Code Ann. § 38-801(g) can be used in a criminal case "to compel production of books, writing or other documents or tangible things in the possession, custody or control" of the opposite party, the State (district attorney and investigating officers),[4/] for use at trial, or at a pretrial evidentiary hearing, where such books, etc., would be admissible and are needed for use as evidence on behalf of the defendant.[5/] Natson v. State, 242 Ga. 618 (5) (250 SE2d 420) (1978). Such a notice to produce may be quashed or modified if it is unreasonable or oppressive. Code Ann. § 38-801(b). A notice to produce cannot be used to enable defense counsel to examine, in advance of trial or evidentiary hearing, the contents of the district

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/3/ This case was tried before enactment of the 1980 act providing for discovery of the defendant's confession or statements made in police custody and for discovery of scientific reports to be used by the state (e.g., crime lab reports, autopsy reports, blood alcohol test reports). Ga. L. 1980, p. ____ [H.B. No. 672, Act No. 1333].

/4/ A separate subpoena duces tecum directed to the investigating officers may be necessary. See Booker v. State, 242 Ga. 773 (1) (251 SE2d 518) (1979).

/5/ A notice to produce in a criminal case under Code Ann. § 38-801(g) is not as all inclusive as a request to produce discoverable evidence under our Civil Practice Act, Code Ann. §§ 81A-134(a), 81A-126(b).

attorney's file. Natson v. State, supra. As was held in Natson, a notice to produce cannot be used in a criminal case to require the production of the district attorney's work product; reports, memoranda and documents in the files of law enforcement officers; addresses and telephone numbers of the state's witnesses; or the names and addresses of other persons with knowledge of the facts.[6] As was pointed out in Stevens v. State, 242 Ga. 34 (1) (247 SE2d 838) (1978), witness statements are not subject to notice to produce, although exculpatory witness statements are subject to disclosure under Brady v. Maryland, supra. Accord: Hamby v. State, 243 Ga. 339 (2) (253 SE2d 759) (1979); Spain v. State, 243 Ga. 15 (2) (252 SE2d 436) (1979).

Brady v. Maryland, supra, requires that, on motion for production of specific material, the defendant be furnished exculpatory information; i.e., information favorable to the defendant and material either to guilt or punishment.[7] Where a Brady motion is made and the prosecutor does not make the specified material available to defense counsel, the trial judge should make an in camera inspection of the material sought. Payne v. State, 233 Ga. 294, 296 (210 SE2d 775) (1974); Fleming v. State, 236 Ga. 434, 438 (224 SE2d 15) (1976); Watts v. State, 239 Ga. 725, 727 (238 SE2d 894) (1977). On motion by the defendant the material examined in camera should either be sealed and filed, Durham v. State, 239 Ga. 697 (3b) (238 SE2d 334) (1977); or an inventory or record of the examined material made, so as to permit appellate review, Dickey v. State, 240 Ga. 634, 637, fn. 1 (242 SE2d 55) (1978).[8] Once the material is sealed or inventoried by the trial court, the appellate court can, upon the defendant's showing cause, exercise its discretion and call for the examined material.

/6/ The names of the state's witnesses are obtainable under Code § 27-1403.

/7/ The United States Supreme Court has held that a prosecutor is under a duty to furnish the defendant, without request, material which creates a reasonable doubt as to the defendant's guilt. United States v. Agurs, 427 U. S. 97 (SC , LE2d) (1975).

/8/ As can be seen from the above discussion, the in camera inspection looking for possibly exculpatory material is one of the progeny of Brady v. Maryland, supra. A notice to produce does not result in an in camera inspection.

In the case before us the defendant moved that the examined materials be sealed and filed for appellate review and we have ordered that those materials which the trial judge examined in camera be sealed and transmitted to this court under certificate of the judge as to whether the file contains all the materials examined by him. The trial judge had initialed the materials he examined and he has certified that to the best of his knowledge and belief those materials he examined, excluding any admitted into evidence during the trial, have now been transmitted to this court, together with other materials later placed in the files. In addition, the trial judge's certificate is supported by affidavits of the prosecuting attorney and the investigating officer. Subpart four (4) of defendant's enumeration of error, above (failure to make a record of the examined materials so as to permit appellate review), has been rendered moot.[9/]

We have examined the material furnished to us and find no exculpatory material, with one possible exception (not examined by the trial judge prior to trial). A Georgia Crime Information Center report reflects that one David Burns was convicted on four counts of dangerous drugs and bad check and was given three months probation and required to pay $36 in restitution. Such information was called for by defendant's motion for discovery. However, in view of the corroboration of witness David Burns' testimony by Kenneth Burns and Patty Johnson, as well as the subsequent corroboration of the testimony of Patty Johnson by the defendant, we find that this information was not material either to defendant's guilt or punishment. Brady v. Maryland,

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/9/ Owens v. State, 233 Ga. 869 (214 SE2d 173) (1975), is not applicable here. That case involved the post trial recreation of testimony of potential jurors whereas this case involves the transmission of files containing written documents.

supra. Hence, subpart one (1) of defendant's enumeration of error, above, is not grounds for reversal.

Whether or not the statements of Patty Johnson and David and Kenneth Burns were exculpatory is immaterial; they were made available to the defendant. Thereafter it was not the responsibility of the court to determine if those statements were exculpatory. It was not error to refuse to make copies of those statements for defense counsel where counsel saw those statements in advance of trial and had them available for use at trial. Subparts two (2) and three (3) of defendant's enumeration of error, above, are not grounds for reversal.

2. In his final enumeration defendant asserts error in the admission of testimony by the investigating officer as to out-of-court conversations that he had with certain witnesses. The victim's driver's license and a payroll check were found on his body. Through the employer, an address for the victim was obtained. The house had burned. Patty Johnson, who lived next door, was interviewed to find out where the occupants of the burned house had moved. The officer testified on direct examination that he learned from Patty Johnson the names of the people who had been living next door with the victim until the fire. Patty Johnson told the officer during this interview that she last saw the victim on the afternoon before the murder. He testified that he located and interviewed the former neighbors. At this point the defense objected to any testimony concerning conversations, but the trial court allowed the testimony to explain the officer's conduct of the investigation. See Code § 38-302. The officer said that information he received from the victim's former housemates led him back to Patty Johnson. The defendant asserts that after this information was given, it was error for the prosecutor to ask, "How did you determine

that, or why did you go back to Patty Johnson's after talking with these people?" This question elecited testimony from the officer that he learned the name "Joey Wilson" from the victim's former housemates and information which indicated that Patty may have seen the victim later than she had admitted. This had led him back to Patty Johnson.

Defendant asserts that the state's purpose was to put before the jury the exact words of an out-of-court declaration and that the suspicion that Patty Johnson had misstated the time she last saw the victim was prejudicial. No exact words were repeated. The testimony of the officer merely showed why he returned to talk with Patty Johnson. Patty Johnson later testified that the victim had been at her house at about 9:45 p.m. on the evening in question. The former neighbors later testified that the defendant had told them he was going to blow the victim away. Any error in admitting the officer's testimony for the limited purpose of explaining his conduct was rendered utterly harmless by the subsequent admission of the testimony of the witnesses referred to by the officer. Mooney v. State, 243 Ga. 373 (5) (254 SE2d 337) (1979); Arnold v. State, 236 Ga. 534 (5) (224 SE2d 386) (1976).

3. Sentence Review. (A) Code Ann. § 27-2537 requires this court to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." One prospective juror was stricken for cause under Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968). The transcript of voir dire shows that this juror was properly disqualified.

In his closing argument in the sentencing phase, the prosecutor began by addressing his remarks to the trial court with the jury present. He argued four points in favor of imposing

the death penalty (retribution, deterrence, protection of society by removal, and rehabilitation). The prosecutor quoted Gregg v. Georgia, 428 U.S. 153, 183-184 (96 SC 2909, 49 LE2d 859) (1976), on the retribution theory justifying the imposition of the death penalty. He argued the tendency of the defendant to escape, as evidenced by his past record, and noted that the Alday murderers were escapees. [See Coleman v. State, 237 Ga. 84, 96 (226 SE2d 911) (1976).] Regarding protection of society, he read to the trial court from Eberhart v. State, 47 Ga. 598, 610 (1873), attributing the remark to "a noted legal scholar of the 1800's." The prosecutor next addressed his remarks specifically to the jury, referring back to his earlier argument and also quoting the state's argument to the United States Supreme Court in Gregg v. Georgia, supra, in reference to deterrence and protection of society.

We have condemned the practice of quoting from Eberhart v. State, supra. Hardy v State, 245 Ga. 272, 279 (SE2d) (1980); Hawes v. State, 240 Ga. 327, 335-336 (240 SE2d 833) (1977). The practice of quoting nevertheless has continued. Each case must be decided upon its own facts as to the question of passion, prejudice, etc. Ruffin v. State, 243 Ga. 95, 105 (252 SE2d 472) (1979). We will continue to review each case on that basis, giving particular scrutiny to quotations read in the presence of the jury. Reading the prosecutor's closing argument as a whole in this case we find that except for the extraneous and unnecessary reference to the Alday murders, he used the quotations referred to above in making a rational argument to the jury for imposition of the penalty of death, he did not make it appear that the judiciary approved imposition of the death penalty in this case, and we do not find that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor.

(B) We must next consider whether the evidence supports the jury's finding of the statutory aggravating circumstance that the murder was committed while the offender was engaged in the capital felony of kidnapping with bodily injury. Code Ann. §§ 27-2537(c)(2); 27-2534.1(b)(2). There was no evidence of bodily injury to the victim other than the shot which caused his death. Although the defendant in this case received only a life sentence for the offense of kidnapping with bodily injury, where the victim of the kidnapping is killed kidnapping with bodily injury is a capital felony for purposes of our statutory aggravating circumstances. Peck v. State, 239 Ga. 422, 431-432 (238 SE2d 12) (1977). This court has held that kidnapping with bodily injury and murder are not included crimes as a matter of law or fact and that where a kidnap victim is murdered the aggravating circumstance of kidnapping with bodily injury is supported by the evidence. Pryor v. State, 238 Ga. 698, 701, 703 (234 SE2d 918) (1977), Potts v. State, 241 Ga. 67, 86-87 (243 SE2d 510) (1978); Stephens v. Hopper, 241 Ga. 596, 600 (247 SE2d 92) (1978). The evidence supports the jury's finding of kidnapping with bodily injury beyond a reasonable doubt (see the statement of the facts of this case, above).[10/]

/10/ Because the aggravating circumstance found by the jury was that the offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping with bodily injury (a crime as to which the jury had found the defendant guilty), Code Ann. § 27-2534.1(b)(2), the decision in Godfrey v. Georgia ____ U. S. ____ (No. 78-6899 decided May 19, 1980) is not involved here. As the United States Supreme Court noted in Godfrey, supra (opinion of the Court, fn. 2), ground (2) of Code Ann. § 27-2534.1(b) is more specific and objectively measurable than ground (7).

(C) In reviewing the sentence of death, we must determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the similar cases listed in the appendix support affirmance of the death penalty for murder. The cases show that juries are not unwilling to impose the penalty of death for murder where the victim has been kidnapped and deliberately put to death.

The evidence shows that the defendant, carrying a shotgun, sought out the victim intending to kill him, that he transported the victim at gunpoint to a secluded spot at night, and that he deliberately murdered the victim by shooting him between the eyes with the shotgun at close range. The sentence of death imposed upon Joseph Wilson, Jr., is not excessive or disproportionate considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

35987. WILSON v. STATE

APPENDIX

1. Pryor v. State, 238 Ga. 698 (234 SE2d 918) (1976)
2. Morgan v. State, 241 Ga. 485 (246 SE2d 198) (1978)
3. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)
4. Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979)
5. Hardy v. State, 245 Ga. 272 (SE2d) (1980)
6. Dampier v. State, 245 Ga. 427 (SE2d) (1980)

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IN THE SUPREME COURT OF GEORGIA

JOSEPH WILSON, JR.,

Appellant,

v.

THE STATE,

Appellee.

CASE NO. 35987

BRIEF OF THE APPELLANT

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Respondent's Appendix B

IN THE SUPREME COURT OF GEORGIA

JOSEPH WILSON, JR.	*	
Appellant,	*	CASE NO. 35987
v.	*	BRIEF OF THE APPELLANT
THE STATE,	*	
Appellee,	*	

PART ONE

A. Statement of the Case.

The appellant, JOSEPH WILSON, JR., was convicted of the murder of George A. Knox. The appellant was also convicted of kidnapping with bodily injury and possession of a firearm during the commission of a crime.

The prosecution presented three main witnesses, Patty Johnson, David Burns, and Kenneth Burns. These witnesses testified that they were present at the home of Patty Johnson when the appellant took the victim from the home at the point of a sawed-off shotgun.

There was testimony that each of these witnesses had been drinking either at the home of Patty Johnson or earlier in the evening, and at a close proximity to the time they allegedly saw Joey Wilson.

Patty Johnson, David Burns, and Kenneth Burns each gave sworn, pre-trial statements which were transcribed by a court reporter. Each one of them gave a statement on February 27,

1979. On March 2, 1979, Patty Johnson gave another sworn statement "to clear up some gaps in her testimony." Reading the two statements of Patty Johnson and the statements of the Burns brothers, there are inconsistencies and conflicts. It was important for the defense to have copies of these sworn statements to test the credibility of the State's witnesses because it was their testimonies which established the State's case. Defendant's attorneys were allowed to read the statements and make notes but they were not given copies, when copies were readily available. The court did not give the defense copies of the statements because the State didn't want the defendant's attorneys "nit-picking" every detail of their case.

The defense filed a Brady motion and two Notices to Produce, which were aimed at obtaining copies of the statements prior to trial. The second Notice to Produce was specific and outlined that the statements were material to defendant's case. The defendant has never received complete use of these statements but during the trial, a matter came up which was impeaching, and defendants were allowed to see a copy of this statement. The defendants were never given complete use of these statements and because of this they were not allowed to cross-examine the State's witnesses in detail about their prior, transcribed statements.

The defendant, through his attorneys, further requested that all evidence reviewed in the in camera inspection be made a part of the record for appellate review. This request was

denied over objection of the defendant.

The inconsistent statements of the State's three main witnesses, their different descriptions of the sawed-off shotgun, and the fact that each witness was under the influence of alcohol to a degree, were facts which should have affected the credibility of the State's three main witnesses. Sgt. J. C. Adams was allowed to testify to the detailed conversations with witnesses while investigating the alleged crime. These conversations tended to bolster the credibility of the State's three main witnesses, as it could only confirm what they allegedly saw. Over objection, the statements were allowed into evidence to show the conduct of the investigating officer. The defendant argues that it was error to go one step further, and allow Sgt. Adams to testify and relate the exact communications that he had while investigating the crime.

After the trial, the defendant was convicted of the offense of murder, kidnapping with bodily harm, and possession of a firearm during a felony from which verdict and judgment he now appeals. Defendant received the sentence of death for the offense of murder, the sentence of life imprisonment for the offense of kidnapping, and the sentence of five years imprisonment for the offense of possession of a firearm during commission of a felony.

B. Questions Presented.

The questions presented are as follows:

1. Did the trial court err by failing to insure at the request of the defendant that the papers examined by it in camera be made a part of the record for appellate review with the Brady procedure?

2. Was the defendant's right to a thorough and sifting cross-examination abridged when the State failed to provide the defendant with copies of the written statements?

3. Was it error for the court to allow Sgt. J. C. Adams to testify as to out-of-court conversations with witnesses?

PART TWO

Enumeration of Errors

IN THE SUPREME COURT OF GEORGIA

JOSEPH WILSON, JR., *

Appellant, *

v. * CASE NO. 35987

THE STATE, *

Appellee. *

ENUMERATION OF ERRORS

Comes now the Appellant and file this his Enumeration of Errors as follows:

I.

The trial court erred by failing to order the State's files to be made a part of the record for appellate review of his rights under Brady.

II.

The trial court erred in failing to rule the statements of Patty Johnson, David Burns, and Kenneth Burns were exculpatory and the court further erred in failing to order that the attorneys for the defendant be provided with copies of the pre-trial, transcribed, statements of Patty Johnson, David Burns, and Kenneth Burns, pursuant to their Notice to Produce.

III.

The trial court erred in allowing Sgt. J. C. Adams to testify as to the out-of-court conversations that he had with witnesses.

This Court, rather than the Court of Appeals, has jurisdiction of this case for the reason that the defendant was convicted of a capital felony requiring review by the Supreme Court under the provisions of the Constitution of the State of Georgia, Article VI, Section 2, Paragraph IV, Georgia Code Ann. Section 2-3104 (Rev. 1977).

This 29th day of February, 1980.

s/
KENNETH J. VANDERHOFF, JR.
Counsel for Appellant

s/
LYNWOOD D. JORDAN, JR.
Counsel for Appellant

PART THREE - ARGUMENT AND CITATION

I.

THE TRIAL COURT ERRED BY FAILING TO ORDER THE STATE'S FILES TO BE MADE A PART OF THE RECORD FOR APPELLATE REVIEW OF HIS RIGHTS UNDER BRADY.

If the defendant wishes to contest the findings of the judge pursuant to the in camera inspection, the burden is on him to show that the judge's determinations were erroneous. Watts v. State, 239 Ga. 725.

The defendant cannot do this case because he has no record. He has a right to appeal but no means to assert it. This is a denial of due process. Without the presence of the documents reviewed by the trial court in camera, no check exists on any abuse of a defendant's right to favorable or exculpatory material.

The court stated in pre-trial motions as follows: "The only statement that I read was that of Mrs. Patty Johnson." (T-12, L-12) The District Attorney's file should have contained transcribed, pre-trial, statements of three witnesses: Mrs. Patty Johnson, David Burns, and Kenneth Burns. Whether or not the court received the statements of David Burns and Kenneth Burns cannot be substantiated because there is no record of the State's file. This is a prime example as to why the State's file should be made a part of the record.

II.

THE COURT ERRED IN FAILING TO PROVIDE DEFENDANT WITH A COPY OF THE TRANSCRIBED, PRE-TRIAL, STATEMENTS OF THE STATE'S THREE MAIN WITNESSES, PATTY JOHNSON, DAVID BURNS, AND KENNETH BURNS.

The defendant through his attorney filed a Notice to Produce which was heard on June 14, 1979, by the trial judge. This hearing was transcribed and this Notice to Produce and a subsequent Notice to Produce, which was filed on July 27, 1979, were specific and indicated the materiality and favorable nature of the statements requested. Defendant's request was in accordance with the specificasity outlined in Stevens v. State, 242 Ga. 34, 1978. In the court's order, dated July 23, 1979, the court ordered that the statements of Patty Johnson, David Burns, and Kenneth Burns be submitted to the court for purposes of undergoing "in camera" inspection and if the court finds them exculpatory or otherwise favorable then copies will be provided to counsel for the defendant.

The day of the trial, the court informed the attorneys for the defendant that "the court didn't find anything exculpatory so far as the defendant is concerned, that you wouldn't already know by seeing the statements themselves." (T-12, L-5).

The court stated that "The only statement that I read is that of Mrs. Patty Johnson." (T-12, L-12). The record shows that Patty Johnson made two pre-trial, sworn, transcribed statements and each of the Burns brothers made a statement.

Therefore, there was no determination if the statements were exculpable to the defendant, if the court only read one statement of Patty Johnson. Since the evidence reviewed in the in camera inspection was not placed in the records for appellate review then this fact remains unanswered.

A notice to produce under Georgia Code Ann. Section 38-801(g)(Rev. 1974), is available to an accused in a criminal trial by virtue of the provisions of Georgia Code Ann. Section 38-802 (Rev. 1974). Those code provisions mandate production upon notice at trial of a criminal case. Brown v. The State, 238 Ga. 98 (Rev. 1976).

The court failed to turn over copies prior to trial but it did provide the defendant with a copy once the court became aware of any testimony that was contradictory to the pre-trial statements. Prior to trial the defendant repeatedly requested the complete use of copies of the pre-trial statements. The court denied the defendant copies of the statements and stated "that the reason for it, of course, is that the State don't want nit-picking of every word they might have used." (T-18, L-19).

The fact that the State doesn't want nit-picking is a conjectural subversion of the trial court's function. It is the function of the trial court to control abuses of witnesses by the defense at the time of the trial, and it is not the function of the State or the court to attempt to do this prior to trial, and certainly not when the statements were subject to

a specific Notice to Produce.

Although the defendant's attorneys were allowed to read the statements and make notes, the denial of the copies, when copies were readily available, denies the defendant of the complete use of favorable evidence which would discredit Patty Johnson's, Kenneth Burns', and David Burns' testimony.

The denial of the statement prevented the defendant from conducting a thorough and sifting cross-examination of the State's three witnesses. It further prevented the defendant from properly attempting to discredit the testimony of the State's witnesses. Therefore, it was error for the court not to provide the defendant with the pre-trial statements of these three witnesses. The discrepancies in the three pre-trial statements by the three eye-witnesses to the alleged kidnapping should have been enough alone to allow the court to declare them exculpatory and favorable, and, therefore, tender a copy to the defendant's attorneys. Defendant further urges that the State's reason for objecting to the defendant having copies of these pre-trial statements which were supposedly to prevent nit-picking, suggests that these statements, were, at the least, arguably favorable to the defendant's defense.

Therefore, the court erred in not providing defendant with a copy of the three statements which were specifically requested in the Notice to Produce, and the court subsequently erred by not determining that the statements were exculpatory and materially favorable to the defendant, and failing to

provide the defendant with a copy pursuant to its order of July 23, 1979.

III.

THE TRIAL COURT ERRED IN ALLOWING SGT. J. C. ADAMS TO TESTIFY AS TO OUT-OF-COURT CONVERSATIONS THAT HE HAD WITH WITNESSES.

An objection to the investigator's out-of-court conversations was made and this objection was overruled because the State's counsel stated that conversations were offered for the limited purpose of showing the officer's conduct. (T-440, L-10).

The basis of defendant's objection is that testimony was not offered to show the officer's conduct in conducting his investigation and if it was attempted to be offered to show conduct, the State went one step more as this testimony was prejudicial to the defendant.

The District Attorney propounded the question to the investigator which was as follows: "All right. Now I am going to get back to what they exactly told you concerning what Joey said later. Right now I want to ask you if, as a result of the information, what did you then do?" (T-441, L-19).

Sgt. J. C. Adams answered as follows: "This led me back to Patty Johnson's place."

Georgia Code Annotated 38-203, admits testimony of investigating officer concerning his conversations with witnesses

for the limited purpose of explaining conduct. Defendant argues that after J. C. Adams stated that "This led me back to Patty Johnson's place" then his conduct was already explained. Defendant contends that for the State to go further and ask the question, "How do you determine that or why did you go back to Patty Johnson's after talking with these people" was prejudicial to the defendant. The testimony had already explained the officer's conduct and the State had already explained the end result which was returning to the home of Patty Johnson. For the State's attorney to prompt a more specific and detailed answer from Sgt. Adams by liciting the following testimony: "The fact had arose that Joey Wilson had been at this location during the evening hours at some period of time on Friday. He had stated that he already contacted Patty; that Joey had been there earlier, so, with this information I went back to see Patty with the assumption that George had probably been at Patty Johnson's. That he had been there either later or on in the evening hours, or there at a later time than what she had told me." was prejudicial to the defendant.

The State's only purpose was to put before the jury the exact words of an out-of-court declarance.

Although the better practice is to bring out the fact of the conversation without relating the exact words used, where details are given there is no reversible error unless the words are prejudicial. Arnold v. State, 236 Ga. 534, 1976.

This question and answer as stated above, does not fall under the objection to the hearsay rule and the specificasity of the investigator and the details are prejudicial to the defendant.

CONCLUSION

For these reasons, the appellant respectfully requests this Court to reverse his conviction for the offense of murder, kidnapping with bodily harm, and possession of a firearm.

This 29th day of February, 1980.

s/
KENNETH J. VANDERHOFF, JR.
Attorney for Appellant

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P. O. Box 738
Cumming, Georgia 30130
(404) 887-1445

This is to certify that I, Kenneth J. Vanderhoff, Jr., attorney for the Appellant, have this day served Frank Mills, III, attorney for Appellee, and Attorney General Arthur K. Bolton, with a copy of the foregoing Enumeration of Errors, by depositing a copy thereof in the United States Mail addressed to the former at P. O. Box 428, Canton, Georgia 30114, and the latter at 132 State Judicial Building, Atlanta, Georgia 30334.

This 5 day of March, 1980.

s/
KENNETH J. VANDERHOFF, JR.

IN THE SUPREME COURT OF GEORGIA

JOSEPH (JOEY) WILSON, JR.	*	
	*	CASE NO. 35987
Appellant,	*	
	*	ON APPEAL FROM THE SUPERIOR
v.	*	COURT OF FORSYTH COUNTY
	*	
STATE OF GEORGIA	*	MURDER, KIDNAPPING WITH BODILY
	*	INJURY, POSSESSION OF A FIRE-
Appellee.	*	ARM DURING COMMISSION OF A CRIME
	*	

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLANT

VANDERHOFF & JORDAN
Attorneys for Appellant
P. O. Box 738
Cumming, Georgia 30130

IN THE SUPREME COURT OF GEORGIA

JOSEPH (JOEY) WILSON, JR.	*	CASE NO. 35987
Appellant,	*	ON APPEAL FROM THE SUPERIOR COURT OF FORSYTH COUNTY
v.	*	
STATE OF GEORGIA,	*	MURDER, KIDNAPPING WITH BODILY INJURY, POSSESSION OF A FIREARM DURING COMMISSION OF A CRIME
Appellee.	*	

I. INTRODUCTION

So often an appellant in a criminal case is tempted to list enumeration after enumeration hoping to snag something somewhere irrespective of the real merits of each separate claim.

The appellant has not chosen to burden the Court, and its clerks, with that approach in this case.

The appellant must, however, file this supplemental brief as authorized by Georgia Code Ann., Section 24-4541 (Supp. 1979), to augment his argument and his enumerations of errors which are a part of the brief, Ga. Code Ann., Section 24-4539 (Supp. 1979). Appellant adds the following sub-parts to Enumeration I and re-states his enumerations of errors.

II. SUPPLEMENTAL ENUMERATIONS OF ERRORS

IN THE SUPREME COURT OF GEORGIA

JOSEPH WILSON, JR.,	*	CASE NO. 35987
Appellant,	*	
v.	*	
THE STATE,	*	
Appellee.	*	

SUPPLEMENTAL ENUMERATIONS OF ERRORS

Comes now the appellant and files this his Enumerations of Errors as follows:

I.

The trial court erred by failing to make any record whatever of the in camera inspection:

(a) By failing to deposit copies or originals of the documents examined by the court into the registry of the court as part of the record, a patent refusal to make a record, the appellant is precluded from securing appellate review of the trial court's discretionary action with regard to the in camera inspection.

(b) The trial court erred in failing to make any record whatever of the in camera inspection.

(c) The trial court erred by insuring impossibility of appellate court review of the in camera inspection in violation of

the due process requirements of the Georgia Constitution and the Constitution for the United States.

(d) Georgia statutory law requires a record of all proceedings to be made in a criminal prosecution and failure of the trial court to so make a record violates the due process requirements of the Georgia Constitution and the Constitution for the United States of America.

(e) The failure of the trial court to have an inventory of the documents examined at the in camera inspection made pursuant to its own written order was error and precludes the defendant from any supplementary action whatever with regard to the record in violation of the due process requirements of the Georgia Constitution and the Constitution for the United States of America.

(f) The trial court abused its discretion in failing to provide the defendant with favorable material discovered in the in camera inspection.

(g) Favorable material existed in the files examined by the court during the in camera inspection which the trial court failed to supply to the defendant, which was error.

II.

The trial court erred in failing to rule the statements of Patty Johnson, David Burns, and Kenneth Burns were exculpatory and the court further erred in failing to order that the attorneys for the defendant be provided with copies of the pre-trial,

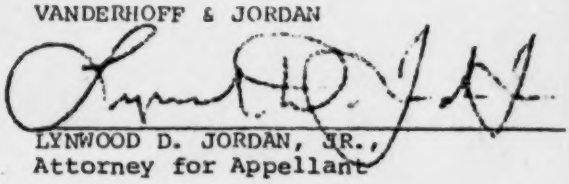
transcribed, statements of Patty Johnson, David Burns, and Kenneth Burns, pursuant to their Notice to Produce.

III.

The trial court erred in allowing Sgt. J. C. Adams to testify as to the out-of-court conversations which he had with witnesses.

Respectfully submitted, this 10th day of April, 1980.

VANDERHOFF & JORDAN



LYNWOOD D. JORDAN, JR.,
Attorney for Appellant

III. SUPPLEMENTAL STATEMENT OF FACTS

By happenstance, appellant's counsel received this week the March issue of The American Bar Association Journal containing an article on the British judicial system. Part of it is pertinent:

> "There are no briefs on appeal, and there is no transcript of testimony, although the questions and answers were recorded by a shorthand writer. The appellate judges would not have the vaguest idea of what the case involved until they heard Shindler's oral explanation. Knowing, however, that one of them must give a decision at the close of the oral argument, they all would be most attentive. The second half hour would be more like a seminar or a decision-making conference with the lawyers participating. There is a constant colloquy among the judges and barristers, and if a question of law arises, books are taken from the shelves that line the courtroom and passages are read, discussed, and distinguished openly. After listening to this, a visitor can almost always guess the decision.
>
> In a completely oral system, in which the judges depend on counsels' presentations, the barristers' duty not to deceive the court is taken very, very seriously. At an earlier session in the Criminal Division, I had heard the chief judge interrupt a lady barrister who in her argument slanted the facts in her client's favor, as is so commonplace in our courts. The judge broke in and proclaimed, 'You lie to me.' This was a most unusual happening in such a decorus climate, but it did happen, and I have no doubt that that Portia will never attempt again to bend the truth.
>
> After this appellate conference is over, usually without recess, one of the judges gives a reasoned oral decision, setting out the facts, what the lower court did, the law, and the reason for its decision."

A.B.A.J., March, 1980, at 334.

That is the spirit with which the appellant presents this his supplemental arguments. The facts will not be "slanted."

Underlying policy considerations should be always in the minds of members of the bar when examining the very nature of appellate review--and that is the crux of this case.

> "Justice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial." Coppedge v. United States, 369 U.S. 438, 455-56 (1962) (Stewart, J., concurring).

> "The principal reason for having appellate courts is to provide an opportunity for several minds to check the trial decisions made by one mind." ABA Section of Judicial Administration, Report on Internal Operating Procedures of Appellate Courts 14 (1961).

> "Nobody contends, and I would not do so either, that the legal system would be better served if all courts of original jurisdiction had final competence to decide all cases. The possibilities of error, oversight, arbitrariness and even venality in any human institution are such that subjecting decisions to review of some kind answers a felt need: it would simply go against the grain, today, to make a matter as sensitive as a criminal conviction subject to unchecked determination by a single institution." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441,453 (1963).

Those principles and policy considerations underpin appellant's written arguments below.

The appellant could argue irrelevant matter as does the State. Appellant believes the court will agree that a fair paraphrase of the State's brief would be "look at all the things we graciously did for this defendant which we did not have to do. Now please overlook anything we should have done, but did not." (DA, 15).

The admonition in the American Bar Association Journal article should apply where the State has slanted (or ignored) the clear record.

> "Appellant through all the proceedings never actually requested the State's file be made a part of the record on appeal." (DA, 14).
>
> "Additionally, an examination of the record in this case reveals the absence of any request by the Defendant that the file be made a part of the record." (AG, 14).

("DA" refers to the District Attorney's brief, and "AG" refers to the Attorney General's brief).

The defendant made a specific request and motion for copies of the documents examined by the court in camera.

> "...the problem that I have with these encameron(sic) inspections is there being nothing on the record as to the result of them as far as the court reporter is concerned, and no copies of anything inspected which could be used for appellate purposes for review...But I would like, or I would request, and move the Court that some report on the record be made of this encameron(sic) inspection, and that either(sic) a copy be made and put in the registry of the Court away from our eyes so we don't get any knowledge we are not supposed to have, so that we can have an appellate review if it becomes necessary." (Hearing Transcript, June 14, 1979, pages 31 and 32). (Emphasis supplied)

The State understood that request.

> "...he hasn't really specifically asked the Court for an inventory or a copy to be made of everything in the State's file that was submitted for the encameron(sic) inspection. But, I assume that is generally what he is hitting at, and I don't know exactly what he refers to and I don't have any objection to the Court making that record." (Hearing Transcript, June 14, 1979, page 32). (Emphasis supplied)

The court understood the request. "some record is what he is talking about." (Hearing Transcript, June 14, 1979, page 32).

The court and the State, at the hearing, obviously also agreed to make an inventory. (Hearing Transcript, June 14, 1979, page 33).

At the next hearing in this case, when the prosecution became ready to turn the file over to the court for an in camera inspection, the court clearly stated, "We want to have an inventory of it also of what you do turn over to me." (Hearing Transcript, June 29, 1979, page 3).

After considerable verbiage, the State finally answered the court's question about the inventory.

> "In answering the Court's question as to what would be made available to the Court for in camera inspection, this would essentially consist of my file and the case file of Sgt. Adams...
>
> * * *
>
> "What we would suggest is rather that an inventory which would be quite involved, inasmuch as this is a death penalty case and this is one of the earliest in camera inspections we have ever had, and obviously an in camera inspection is a continuing motion. What we would request is that if the Court could, rather than trying to initial every page, but if the Court could initial what appears to be every separate exhibit..." (Hearing Transcript, June 29, 1979, pages 6 and 7).

The State admitted that the files were "involved."

The Court asked the defendant about merely initialing every document, and the defendant/appellant made it clear that he wished a record to be made of the items examined. (Motion Transcript, June 29, 1979, pages 8 and 9).

Thereafter, without further hearing, the court published an order dated July 23, 1979, wherein it was stated that no inventory would be undertaken and in lieu thereof, the court would initial each exhibit submitted to the court which would include both the files of the District Attorney and the Forsyth County Sheriff. (R-24).

Even as late as the trial, the appellant made it clear to the court that he wished a record to be made of the in camera inspection--not a record before the in camera inspection, not a record after the in camera inspection, but a record of the in camera inspection. "We still think, to protect the defendant's rights, that an inventory should have been made in the in camera, and we want to make it clear that we haven't waived that right." (T-13). (Emphasis supplied).

The court understood the specific request and also understood that the defendant did not waive his claim. "I understand that you haven't waived that right. It would have been impossible. Like one scrap of paper with numbers on it. It just was not a file that was deserving of an inventory." (T-13).

The requests and motions of the defendant were clear.

Something is wrong when the State admits that the files being submitted to the court are "involved" and the court thereafter states that the files are not deserving of an inventory.

IV. SUPPLEMENTAL ARGUMENT

In this sequence of events, there become relevant several principles:

(a) The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, S. Ct. 1194, 1196 (1963).

(b) Examination of material by a trial judge in camera pursuant to Brady is a discretionary ruling. Durham v. State, 239 Ga. 697, 700 (1977).

(c) The accused bears the burden of making a "countershowing" when attacking the trial judge's ruling on the in camera inspection. Durham v. State, supra.

(d) The law of Georgia requires that in any criminal case where a court reporter is present, "...all other proceedings which may be called in question on appeal or other post-trial procedures shall be reported...." Ga. Code Ann.,Section 6-805(d) (Rev. 1975) (Emphasis supplied).

(e) "(W)hile the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases (citations omitted] it is perfectly obvious that where such an appeal is provided for, and the prisoner has had benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law...." Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 587 (1914).

(f) If a record is not made of a critical evidentiary or discretionary stage of a criminal trial, and the lack thereof calls into question a constitutional right of the defendant, a reversal is in order. Owens v. State, 233 Ga. 869 (1975).

Examination of the facts set forth above as appearing on the record, and examination of principles set forth and cited above, indicate quite clearly that the present appellant has a right to raise into question an abuse of discretion by the trial judge, that the appellant informed the court that he wished a record to be made for appellate purposes of the in camera inspection, that the law of Georgia requires a record to be made of anything which may be raised on appeal, that no record of the in camera inspection was made despite the specific requests of the appellant, that the appellant has the burden of establishing an abuse of discretion, that the appellant has absolutely nothing at his disposal with which to mount his challenge, and that, in short, the defendant is left high and dry with a right but no remedy.

The appellant made it quite clear that he was going to seek appellate review of the in camera discretionary determinations of the trial court. This was done well in advance of any in camera inspection in good faith.

This is not a case with a defective record needing correction. This is a case involving a clear refusal to make a record in the first instance.

Was it proper to refuse to make a record? The appellant asserts that it was not.

In Owens v. State, 233 Ga. 869 (1975), the defendant had been convicted in the Superior Court of Meriweather County with the death penalty being imposed. The appellant assigned error in that the trial court erred in excluding potential jurors who expressed conscientious objections to capital punishment.

The Owens court did not reach that central issue.

Resolution of the central issue in Owens was not necessary because the transcript was defective and the voir dire examination of prospective jurors on the Witherspoon criteria did not appear in the transcript.

This court in Owens held that the failure to report the Witherspoon voir dire in a case in which the sentence of death is imposed is reversible error. The Owens court recognized the requirement of Ga. Code Ann.,Section 6-805(d)(Rev. 1975), that all proceedings which may be called into question on appeal be reported. The Owens court also rejected any procedure for

supplementation of the record because post-trial examinations of lawyers and court officials is not a satisfactory method for performing the review function.

The present case differs little from Owens.

Of course, Owens can be distinguished from the instant case; however, it is a distinction without a difference.

The distinction lies in the fact that Owens dealt with a defective record on the Witherspoon right. The present case deals with a defective record on the Brady right.

Both rights are basic rights under due process requirements. Neither is "less important" than the other.

The present case also raises questions not specifically set forth in the Owens opinion regarding denial of due process to this appellant under Georgia statutory requirements.

"...all judgments, rulings or orders rendered in the case which are raised on appeal, and which may affect the proceedings below, shall be reviewed and determined by the appellate court...." Ga. Code Ann.,Section 6-701(b)(Supp. 1979) (Emphasis supplied).

"Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, all evidence--whether admitted or stricken on objection or otherwise--copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called in question on appeal or other post-trial procedure shall be

reported, and where the report is transcribed, all such matters shall be included in the written transcript, it being the intention of this law that all these matters appear in the record...." Ga. Code Ann., Section 6-805(d) (Rev. 1975). (Emphasis supplied).

"...the defendant in any criminal proceeding, in the superior or city courts, may appeal from any sentence, judgment, or decision, or decree of such court, or of the judge thereof in any matter heard at chambers." (Ga. Code Ann., Section 6-901 (Rev. 1975) (Emphasis supplied).

"...it is the intention of this law to provide a new procedure for taking cases to the Supreme Court and Court of Appeals ... and, to that end, this law shall be liberally construed so as to bring about a decision on the merits of every case appealed, and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to herein." Ga. Code Ann., Section 6-905 (Rev. 1975) (Emphasis supplied).

None of these statutory mandates were followed in the present case with regard to the Brady in camera inspection and the appellant was denied due process of law under the procedural and substantive law of this forum. The statutory language is clear.

V. CONCLUSION

For these reasons, the appellant respectfully requests this Court to reverse his conviction for the offenses of murder, kidnapping with bodily harm, and possession of a firearm during commission of a crime.

This 10th day of April, 1980.

VANDERHOFF & JORDAN

LYNWOOD D. JORDAN, JR.,
Attorney for Appellant

IN THE SUPREME COURT OF GEORGIA

JOSEPH "JOEY" WILSON, JR., : CASE NO. 3645

Appellant, :

v. :

STATE OF GEORGIA, :

Appellee. : MOTION FOR REHEARING

COMES NOW the appellant and requests this court to order a rehearing of this case for the following reasons in addition to those originally presented:

I.

THE "SUPPLEMENTAL RECORD" APPARENTLY TRANSMITTED TO THIS COURT PURSUANT TO THIS COURT'S ORDER OF APRIL 17, 1980, DOES NOT CURE THE ORIGINAL DUE PROCESS DEFICIENCIES OF WHICH THE APPELLANT COMPLAINED, AND INDEED, INJECTS A FURTHER DUE PROCESS VIOLATION INTO THE CASE AND DEPRIVES THE APPELLANT OF EFFECTIVE ASSISTANCE OF COUNSEL.

On April 17, 1980, this court ordered that the trial judge transmit to it those materials which were examined in camera under certificate as to whether such file contained all of the materials examined. Appellant's counsel received a copy of that order.

Respondent's Exhibit C

On April 24, 1980, the District Attorney apparently forwarded to the trial court "the entire file as is" as evidenced by a letter to the trial court by the District Attorney dated April 24, 1980, a copy of which was served upon appellant's counsel and which is attached hereto.

A fair reading of the letter, which is the last document available to appellant's counsel, indicates that the prosecutor was unable to determine where "the dividing line" was on the appellant's case file and the files of related cases.

Appellant's counsel has received no copy of the trial judge's certificate to this court.

The appellant's counsel has received no copies of any other documents transmitted to this court.

Appellant's counsel has continually monitored the office of the clerk of the trial court and no certificate or other documents have been filed in that office to be included as part of the record to be transmitted to this court after the original hearing.

The only record knowledge available to appellant's counsel of the materials transmitted to this court for review of the in camera inspection is the indication on page 6 of this court's order of June 10, 1980, that the judge's certificate states that all materials examined in camera have been transmitted "to the best of his knowledge and belief."

Appellant asserts that the record of the in camera inspection has not been established to that

degree of specificity necessary to uphold a death sentence. May a death sentence conviction be upheld where the State itself is unable to determine where "the dividing line" is between the file submitted to the court in camera and later file documents? If the State does not know, the entity which amassed the file, certainly neither the trial court nor this court can know either.

If the "dividing line" cannot now be drawn and is admittedly "difficult to determine", how can it be "determine[d]" some 8 months later what is not in the file, i.e., what should have been disclosed but was not?

The State is simply and patently stating that it cannot now state what was in the file delivered to the trial court in camera -- nothing more, nothing less (based upon appellant's limited knowledge of the present record).

In an "abundance of caution", the State now simply dumps everything which it now has into the record.

Under the intent of the statutes cited to this court earlier by the appellant, any person before the bar of justice in this state deserves a greater degree of specificity in the record of the judicial process against him.

Appellant submits that the trial court's certification "to the best of his knowledge and belief" does not supply that certainty.

The fact of "what was examined" must be determined as part of the record required by statute with the same degree of certainty as testimony and the distinction of the Owens

case is without a difference. There is absolutely and unequivocally no difference between recreating oral testimony and recreating documentary evidence when the State cannot determine the "dividing line" and the trial court can muster nothing greater than "belief."

The manner of transmission and state of the record further violates due process requirements and also deprives the appellant of effective assistance of counsel.

Apparently, documents were certified to this court by the trial judge. There is no record of certification or copies of the certified record in the trial court. The clerk of the trial court is required to "... retain an exact duplicate copy of all records and the transcript sent up, with the same pagination, in his office as a permanent record." Ga. Code Ann., §6-808(Rev. 1975)(emphasis supplied).

No record is present in the trial court and appellant's counsel has been unable to ascertain the nature of, or contents of, documents before this court. Appellant's counsel has been unable to argue to this court error on the part of the trial court committed during the in camera inspection and has been unable to see documents examined by this court in determining the merits of appellant's appeal on this or other points. Appellant's counsel did not know on the record that any further documents were before this court until receipt of this court's order of June 10, 1980.

For these reasons, appellant respectfully submits that the original due process deficiencies in the record have

not been cured, that additional due process deficiencies have been injected into the record, and that the appellant has been denied effective assistance of counsel in presenting his case to this court.

II.

THE COURT'S DETERMINATION IN THE "SENTENCE REVIEW" THAT THE DEATH PENALTY WAS PROPERLY IMPOSED WITH REGARD TO THE STATUTORY AGGRAVATING CIRCUMSTANCE OF COMMISSION OF KIDNAPPING WITH BODILY INJURY SHOULD BE RECONSIDERED AND THE DEATH PENALTY SHOULD BE VACATED.

The allowance of the death penalty for the charge of "murder" where the jury finds that the offender was engaged in the capitol felony of "kidnapping with bodily injury" lacks objectivity.

Under the definition of "kidnapping" as it pertains to the State of Georgia, if anyone causes a person to move any distance against his will, the crime of "kidnapping" is committed. The distance is not material.

Under such a definition, very few murders would not involve the crime of kidnapping with bodily injury. Only an "ambush" slaying would not qualify for a statutorily aggravated murder.

If any person pointed a gun at another and forced the

second person to move into another room, from behind a store counter, to step out of his car, to turn around, to take any other action with regard to movement, then and in that event, the death penalty would be warranted.

The Georgia death penalty statute, Ga. Code Ann., §27-2534.1(b)(2)(Rev. 1978), is a "bootstrap" statute which turns in upon itself and allows imposition of the death penalty in just about all cases except ambush slayings.

The precise issue has been skirted in this state in the face of substantial persuasive authority by statements such as "[w]hether or not such a rule is also the law of this State, it is not necessary to decide in the present case as the evidence does not disclose that any other crime was involved, or that the asportation here was incidental to the commission of another crime shown by the evidence." See, Brown v. State, 132 Ga. App. 399, 208 S.E.2d 183 (1974), and cases cited therein. Brown held that movement of 15 feet was kidnapping.

It is now necessary to decide whether such is the law of this state. The evidence allegedly does disclose that "any other crime" was involved. The other crime, murder, involves imposition of the death penalty. The kidnapping here was also only "incidental to the commission of the crime of murder as shown by the evidence.

To allow the State to use the movement of an individual "15 feet," or more (15 miles), or less (how less?), as the basis for death penalty imposition when such movement was part and parcel of the crime of murder does not justifiably delineate those instanc

in which the death penalty is proper.

Under Georgia law, only the ambush murderer who does not control the movement of his victum to any degree whatsoever is free from the death penalty under the "kidnapping" aggravating circumstance.

If the legislature intended to save the victim of an abortive ransom kidnapping from death upon collapse of the scheme, this it did not do and the statute is not so limited. This court now has the opportunity to properly so limit it.

For these reasons, appellant requests this court to reconsider its affirmance of the death penalty under the sentence review.

This 18th day of June, 1980.

VANDERHOFF & JORDAN

LYNWOOD D. JORDAN, JR.
Attorney for Appellant

District Attorney

OF THE

Blue Ridge Judicial Circuit

FRANK C. MILLS, III
District Attorney

ASSISTANTS:
Rafe Banks, III
George W. Weaver
Paul Carden

April 24, 1980

Please Reply To:
P. O. Box 428
Canton, Georgia 30114
Tel. No. 479-1488

Judge Marion T. Pope, Jr.
Cherokee County Courthouse
Canton, Georgia 30114

Dear Judge Pope:

Enclosed herewith are the entire District Attorney's file and the Forsyth County Investigator's file as they now exist together with affidavits to that effect pursuant to the Order of the Supreme Court dated April 17, 1980. I have enclosed the entire file rather than merely that which was submitted for in-camera inspection, as the only way of guaging whether or not there was suppression of evidence by the prosecution is by letting the Supreme Court see the entire file as is.

As you are aware from the Motion for New Trial and otherwise the Forsyth County investigator is continuing to follow up leads which were obtained from the defendant only at trial. In addition there are cases which were made against defense witnesses Joanna Lynn (Jody) Wilson and Joseph G. Wilson, Sr. for PERJURY and against other individuals for ESCAPE all related to the defendant Joseph "Joey" Wilson, Jr. Therefore there have been a great number of additions to the "file", inasmuch as it is difficult to determine (and out of an abundance of caution I will not determine) where the dividing line is between this case file and the files of related cases.

These files are the originals and for the most part there are no copies.

If you have any questions do not hesitate to call me.

Yours truly,

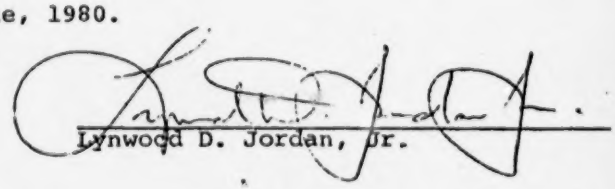
Frank C. Mills, III

FCM:jm
Enclosures
P.S. This obviously does not include the Trial Transcript

CERTIFICATE OF SERVICE

This is to certify that I, Lynwood D. Jordan, Jr., attorney for Appellant, have this day served Frank Mills, III, attorney for Appellee, with a copy of MOTION FOR REHEARING, dated June 18, 1980, by mailing a copy thereof to Frank Mills, III, District Attorney, P. O. Box 428, Canton, Georgia 30114 by depositing same in the United States Mail with adequate postage affixed thereto; and, I have this day served a copy of the MOTION FOR REHEARING, dated June 18, 1980, upon the Attorney General of the State of Georgia by mailing a copy thereof to William B. Hill, Jr., 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334 by depositing same in the United States Mail with adequate postage affixed thereto.

This 18th day of June, 1980.



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